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No. 80-

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

WESTERN AIR LINES, INC.
Petitioner,

vs.

INTERNATIONAL TRAVEL ARRANGERS, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sherman Act can be used to impose a standard of absolute accuracy on a firm that seeks to compete by using the most constructive and useful form of advertising — ads containing detailed comparative information — merely because the purpose of the ad's sponsor is to prevail against its competitors?

2. Whether every firm that employs an advertising agency must risk being held liable for a "conspiracy" in restraint of trade?

3. Whether there was a total failure of appellate review of the sufficiency of the evidence on the issue of market leverage?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
Facts of the Case	3
Parties Involved	3
Travel Group Charters	4
Western's Reaction to TGC Competition	5
Proceedings Below	10
REASONS FOR GRANTING THE WRIT	12
I. THE COURT OF APPEALS' OPINION THREATENS THE PRIMARY GOAL OF THE SHERMAN ACT BECAUSE IT CONDEMNS LEGITIMATE COMPETITION SOLELY BECAUSE IT WAS AGGRESSIVE	15
II. AS COURTS IN NUMEROUS OTHER CIRCUITS HAVE RECOGNIZED, THE SHERMAN ACT IS NOT SUITED TO REGULATE GARDEN VARIETY FALSE ADVERTISING CLAIMS	17
A. Routine False Advertising Claims Are Not Actionable Under The Sherman Act	18
B. The Eighth Circuit's Decision Is In Square Conflict With The Second Circuit's Decision In *Berkey Photo, Inc. v. Eastman Kodak Co.*	21
C. The Court Of Appeals' Failure To Consider The Materiality Of The Alleged Inaccuracies Subverts This Court's Decision In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*	23
III. THE EIGHTH CIRCUIT'S HOLDING THAT THE USE OF AN ADVERTISING AGENCY IS A "CONTRACT, COMBINATION OR CONSPIRACY" UNDER § 1 WILL PRODUCE ABSURD RESULTS AND CONFLICTS WITH DECISIONS IN OTHER CIRCUITS	24
IV. THE MARKET LEVERAGE ISSUE DOES NOT SUPPORT THE JUDGMENT AND SHOULD NOT BE LEFT STANDING	27
V. CONCLUSION	29

TABLE OF AUTHORITIES

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	Page(s)
Albrecht v. Herald Co., 390 U.S. 145 (1968)	24, 26
Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)	20, 21
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Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665 (9th Cir. 1980)	16
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Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	20, 23-24
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United States v. Gasoline Retailers Ass'n, 285 F.2d 688 (7th Cir. 1961)	17
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Clayton Antitrust Act, § 4, 38 Stat. 731, U.S.C. §15	3
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§ 2, 26 Stat. 209, 15 U.S.C. § 2	*passim*
United States Code, Title 28 § 1254(1)	2
Administrative Regulations	
37 Fed. Reg. 20815 (1972)	4
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§ 372a.11 (1973)	4
§ 372a.15(b) (1973)	5
§ 372a.15(d) (1973)	5

	Page(s)
§ 372a.15(e) (1973)	4
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Western Air Lines, Inc. ("Western"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is published at 623 F.2d 1255. The district court did not issue an opinion, but entered an order adopting, with one exception, the findings of fact of the United States magistrate, acting as a special master, and accepting the magistrate's recommendation for judgment. The magistrate filed an unpublished memorandum in conjunction with its findings of fact, conclusions of law, and recommendation. An earlier opinion of the district

court denying petitioner's motion to dismiss or stay respondent's action on the ground that exclusive or primary jurisdiction over the subject matter of this case lies with the United States Civil Aeronautics Board is published at 408 F. Supp. 431. Copies of the Court of Appeals' opinion, all relevant orders of the district court, the special master's findings of fact, conclusions of law and recommendation, and the special master's memorandum are in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 10, 1980. On August 18, 1980, Mr. Justice Blackmun extended petitioner's time to file a petition for certiorari until October 7, 1980. On September 26, 1980, Mr. Justice Blackmun further extended petitioner's time to file a petition for certiorari until October 21, 1980. The court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sherman Antitrust Act of 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 1 *et seq.*:

> "Sec. 1. [15 U.S.C. § 1] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> "Sec. 2. [15 U.S.C. § 2] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several

States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Clayton Antitrust Act, § 4, 38 Stat. 731, 15 U.S.C. § 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

The decision of the Eighth Circuit in this case is a fundamental perversion of the Sherman Act. Stripped of the antitrust platitudes in which it is buried, the opinion below condemns the slightest inaccuracy in comparative advertising if the intent of the sponsor is to prevail against its competitors. This Court has reversed less extreme betrayals of the purpose of the Sherman Act. It ought to take and reverse this case to return advertising to the arena of healthy competition.

Facts of The Case

Parties Involved. Western is a regularly scheduled airline. In 1973, Western's fare and routes were subject to comprehensive Civil Aeronautics Board ("CAB") regulation. Pursuant to that regulation, Western was authorized to serve numerous routings from Minneapolis-St. Paul, including service to Las Vegas, Hawaii and Mexico. As a product of CAB route awards then in effect, Western served the predominant volume of consumer traffic from the Twin Cities to Hawaii and to Las Vegas.

Respondent, International Travel Arrangers ("ITA"), organizes charter flights in and out of Minnesota in com-

petition with regularly-scheduled airlines. In 1973, ITA competed with Western for customers wishing to travel to Hawaii and Mexico, and was an aggressive promoter and advertiser of Travel Group Charters ("TGCs"), a new form of charter air service. ITA's TGCs were marketed through travel agencies, which are the independent distributors of the air travel industry.

Minnesota State Automobile Association (MSAA) is a major Minnesota travel agency through which both ITA and Western sought to obtain travel business.

Travel Group Charters. The CAB first authorized TGCs in 1972. 37 Fed. Reg. 20815 (1972). Unlike previous types of authorized charters, TGCs could be marketed directly to individual travelers. This aspect of TGC authority initiated, for the first time, direct competition between charters and scheduled airline service for the patronage of the individual ticket buyers.

TGCs offered low ticket cost, but not without drawbacks. Each passenger had to contract to purchase his ticket at least 90 days before the flight was scheduled to depart. 14 C.F.R. § 372a.22(b) (1973). He contracted to pay his prorata share of the total charter cost plus a "service charge" constituting the organizer's markup. *Id.* § 372a.10 (g). Thus, the passenger did not know what his actual fare would be when he signed up. The ultimate fare depended on the final number of participants — the fewer the passengers, the greater each passenger's fare, and vice versa.

At the time that a passenger reserved space on a TGC, he had to pay a deposit of at least 25% of the minimum prorata fare. *Id.* § 372a.11. Sixty days prior to departure, the passenger had to pay the balance. *Id.* § 372a.15(a). Finally, 45 days before departure, the actual prorata fare was computed and each passenger had to pay the additional amount. *Id.* § 372a.15(e).

Under certain circumstances, TGC deposits were not refundable in the event of passenger cancellation. Less than 120 days, but more than 45 days before the scheduled departure, a refund was allowed in only two circumstances:

(1) in the event of death or doctor-certified illness preventing travel, or (2) if a willing substitute could be found to assume the passenger's contract. Substitutes could only come from an official "standby list," and only 20% total substitution was permissible on a charter. *Id.* §§ 372a.15(b) & (g). Within 45 days of scheduled departure, a passenger could not obtain a refund even in the case of death or illness unless a substitute could be found from the standby list. *Id.* § 372a.15(b). Loss of deposit was not a trivial risk; apart from the limit on substitution, as departure time approached, persons on the standby list, having made other plans, often declined to participate. 5 Tr. 353-63.[1]

Another drawback of TGC service was the risk that the passenger would find his charter cancelled out from under him. If the flight was not filled 90 days before scheduled departure, it had to be cancelled. 14 C.F.R. §§ 372a.12(a)(1) & 372a.18 (1973). Furthermore, if because of cancellations or defaults, the actual prorata fare would be more than 120% of the minimum prorata fare, the charter also had to be cancelled. *Id.* §§ 372a.14(b) & 372a.15(d). Thus, the regulations clearly indicated that a traveler could "plunk down" his deposit, but "end up going absolutely nowhere." *See* 4 Tr. 319-22; Ex. F.

Western's Reaction to TGC Competition. Because minimum TGC fares were normally cheaper than fares for regularly-scheduled flights, such charters threatened to siphon off a major part of Western's business. Western could not compete with TGCs on price alone because of CAB restrictions, and because Western's costs in flying scheduled service were entirely different than charter costs. The TGC operators thus had a price advantage over Western, and they used this advantage as a competitive weapon by advertising TGC prices on terms that omitted or minimized the drawbacks of TGC travel as compared with scheduled airline service.

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1. References to the trial transcript are indicated by the abbreviation "Tr." References to trial exhibits are indicated by the abbreviation "Ex." Respondent's exhibits were marked numerically; petitioner's exhibits were marked alphabetically.

ITA's Hawaii ad, for example, boldly displayed the $199 minimum prorata fare as if it were a set fare. The ad's only bow to the fact that the fare would increase if a flight was not full was buried towards the bottom of the ad in a cryptic note that $199 was the "round trip air fare, min. pro rata. . . . Cost cannot exceed $238.80 or payment will be refunded, flight cancelled." The ITA ad failed entirely to mention that a passenger might lose his money if he had to cancel, or that the flight might be cancelled when it was too late to make comparable arrangements. Ex. K.[2]

Western responded to TGC competition with an "anti-TGC campaign" that consisted of actively advising travel agents and the public of those aspects of TGCs which Western believed were inferior to Western's arrangements. In the Minneapolis-St. Paul area, Western (1) published an informative newspaper ad that highlighted the drawbacks to TGCs which promoters of TGCs like ITA failed to even mention, (2) sponsored radio commercials asking consumers to read the newspaper ad, and (3) mailed copies of the ad to travel agents with encouragement that they promote Western's services over TGC services. According to the special master, Western hoped that this campaign would "prevent the TGC . . . from effectively competing with regularly scheduled air service." App. 19d.

The district court and Court of Appeals condemned Western's actions as "unreasonable." Particular condemnation was reserved for the newspaper ad. A copy of the

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2. Concerned that the public would not understand the variability of TGC fares, the CAB specifically required that "any announcement or statement to prospective charter participants giving price per seat" note that the fare was "dependent upon the number of seats sold" and that the fare could increase up to 20 percent "as a result of defaults by participants." 14 C.F.R. § 372a.28 (1973). ITA's ads omitted such information.

The CAB also required TGC organizers to submit samples of their proposed promotional materials for review when they filed for a particular charter. *Id.* § 372a.22(a)(5). ITA's proposed ad copy did warn travelers of various TGC drawbacks. Exh. 13. These warnings, however, did not appear in ITA's published ad.

ad, consisting of almost 1,000 words, is reproduced on the following page. Taken as a whole, the ad attempts to list the drawbacks of TGC travel. Buried at seven different places are statements the special master found to be false or misleading. (These statements are shaded.) Although one of the seven statements (the statement noting that all Twin Cities TGCs to Hawaii had had to be cancelled), was mistakenly inaccurate, the remaining six were correct in fact. These six were held to be "misleading," and in some cases "false," because they stated only the adverse facts about TGCs, and omitted arguments that TGC operators might have made to dispel those facts. The special master's specific findings on the six "misleading" statements are summarized in the footnote.[3]

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3. The six true statements nevertheless found to be "misleading" and in some cases "false" were:

   1. "The upshot of it all being that you can plunk down a couple of hundred dollars (or more) for airfare and even more for ground arrangements. And end up going absolutely nowhere."

   The special master found that this statement was "misleading" in that under the TGC regulations, "it was impossible for a prospective passenger to ever forfeit money paid to the organizer for ground arrangements." App. 7d. The challenged statement must be read as part of an advertisement, not a security prospectus. The ad does not indicate that payments for ground arrangements would be forfeited. It indicates that the possibility that deposits would be lost and that a planned vacation trip would be cancelled were "catches" of which the prospective traveler should be aware. Clearly, the statement is literally correct, and its implications were accurate in context. It would be absurd to posit a traveler unconcerned about forfeiture of his ticket deposits so long as ground arrangement deposits would be refunded.

   2. "Or find out your hotel (if you buy an optional ground package). Nobody's sure yet either."

   Four days before the ad was published, a local Western employee made a "check call" to MSAA and was told the name of a hotel that would probably be used on one of its TGC ground tours; this caller was told that the hotel was "not for sure." 18 Tr. 5-13, 28-29; Ex. CC. A similar call was placed to Mainline Travel, which was also organizing TGC's to Hawaii; the agent at Mainline "didn't know" what hotels would be used on ground tours. 18 Tr. 47-51; Ex. EE. The special master, how-

(Footnote continued on the following page)

THOSE "LOW-LOW" AIRFARES TO HAWAII. YOU CAN END UP GOING NOWHERE FOR A COUPLE OF HUNDRED DOLLARS.

Within the past few weeks, you might have seen some travel ads quoting unbelievably low prices for vacation fares to Hawaii.
No, they're not misprints. But we suggest you read the fine print. Very carefully.
They're called "Travel Group Charter" fares.
Can they save you money?
Perhaps. But you should also be aware that there are a lot of catches to these fares.
[redacted]
And it's all perfectly legal.

YOU MUST MAKE YOUR DOWN PAYMENT 90 DAYS IN ADVANCE.

Here are some things they make you do:
–You must make your reservation at least 90 days before you leave.
–You must sign a contract.
–Must deposit 25% of the estimated cost.
And some things you can't do:
–You can't select the date you want to leave. It's already set. Only Tuesdays or Wednesdays. (Which is fine if you want to start your vacation on a Tuesday or a Wednesday.)
–You can't select the day you want to come home. It's also set.
–Or pick a convenient time to leave. Try and find out when you leave. Nobody can tell you. Because nobody's sure yet.
[redacted]
–And under no conditions can you switch planes to extend your stay.

60 DAYS AHEAD YOU MUST PAY THE BALANCE.

If you still want to go, here's what else is in store:
–Two months ahead of departure, you must pay the balance of the "estimated" cost of the trip. Two full months ahead.
–45 days before you leave, you pay the final price of the trip.
–The final price could be as much as 20% more than the estimate.
–So that $130 fare can suddenly become a $258.80 fare.

CANCEL? WELL, MAYBE–

Suppose you want to cancel.
Can you? Only if:
–You're ill. And can provide certification from your doctor to prove it.

–Or your ticket can be assigned to a qualified standby applicant. (But cross your fingers because the standby list has to be established 90 days before departure.)
[redacted]
–If you miss the plane, you lose your money. Period.

45 DAYS AHEAD THEY CAN CANCEL ON YOU.

It's extremely difficult for you to cancel. But can they cancel on you? Easy.
–45 days ahead of departure, if not enough tickets have been sold, the charter operator *must* cancel the trip.
–You'll get a full refund...if that's any consolation, because you'll have to start all over with your vacation arrangements.

HOW YOUR BARGAIN CAN DISAPPEAR.

After going through all the advance planning and uncertainties, here's another way your Travel Group Charter savings can evaporate:
–If you're like 60% of the visitors to Hawaii you'll want to see more of Hawaii than just Oahu.
–Like Maui, Kauai or the big island of Hawaii.
–If you fly a Travel Group Charter, you pay full fare to each island.
–If you fly Western Airlines, you can do it for a flat $9 per island. Look.

YOU'LL PAY MORE FOR INTER-ISLAND FLIGHTS	Full Fare w/ Your Passport	Economy Fare – Available to Western Passengers
[redacted]	$42.00	$18.00
[redacted]	31.40	13.00
[redacted]	38.80	9.00

WHAT THE FINE PRINT WON'T TELL YOU.

It's a fact that:
[redacted]
–If you are on the 1 out of 10 that takes off, don't expect to do much stretching out on your flight. The seats are pretty close together.
–You can actually end up with up to 22% less legspace than you'd get on Western. Which is something to think about on an 8-hour flight.
[redacted]
And after you've weighed all the evidence, frankly, we hope you'll decide to take your Hawaiian vacation on Western Airlines.
Our tickets cost a little more, sure. But you get more, too.

TRAVEL WITH PEACE OF MIND.

When you fly Western, you can look forward to starting your vacation with:
–The peace of mind that comes from knowing that you won't lose all your money if your plans change. Just let us know and we'll be glad to change your flight reservation.
–The convenience of your choice of several departures. Every day of the week.
–The comfort of Western's famous First Class Legspace. And the spaciousness of our new DC-10 Spaceships.
–Our fabulous Islander Service. Featuring Diamond Head sparkling punch. Champagne for all adults, of course. Plus your choice of Polynesian entrees.
It's very simple. You get what you pay for.

Western Airlines
/Hawaii Master/Canada/Western USA/Mexico

Your Travel Agent knows–just say you want to fly Western. Or call us at 726-4141; visit our ticket office at 126 South Seventh Street.

[A large fold-out copy of the ad has been included in the back of this petition.]

The Eighth Circuit purported to find the competitive impact of the Western ad to be material, taken as a whole; thus, there is a finding that the public lost interest in TGCs as a result of Western's ad. 623 F.2d at 1263 & 1271-72;

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ever, found that the above statement was "false and misleading" in that "the statement was not true as of the date of the ad for ITA's TGCs." App. 7d. The ad did not mention ITA, nor did it preclude the possibility that ITA may have arranged for a hotel. The ad merely warned the consumer to check out the specifics of the arrangement under circumstances which clearly warranted the belief that the ground arrangements were being marketed without specific details being available.

3. "If you're lucky enough to get a qualified standby [as a replacement], the charter operator can charge you a 5% 'transfer fee.' "

Although CAB rules specifically permitted charter operators to charge 5% transfer fees upon cancellation, the special master found this statement "false and misleading" because by contract ITA could not have charged such a fee. App. 7d. The ad, of course, did not mention ITA in any way, nor did it state that every TGC operator would charge the 5% fee.

4. "Any later than 45 days before departure and you're virtually out of luck. If your boss switches your vacation, for example, you've had it.

The special master found that this statement was false and misleading because a full refund would still have been allowed within 45 days of departure if a substitute from the standby list could have been used. App. 7d. But the ad itself advised the reader only two sentences earlier of the possibility of obtaining a substitute from the standby list.

5. "Nationally, over 2600 Travel Group Charters have already been cancelled. That's 9 out of 10 flights that were scheduled."

The special master did not dispute the accuracy of this statement, but found that it was "misleading" since this "national experience was not representative of the Twin Cities' experience with TGCs." App. 8d. He also thought that the statement was misleading because it was not limited to cancellations occurring because of inability to attract sufficient passengers. *Id.* The special master never explained why Western had an obligation to speak only in terms of Twin City experience, or to state the precise causes of the national experience with TGC cancellations.

(Footnote continued on the following page)

App. 14a & 29a-30a. But there is no determination that the loss of interest had anything to do with the alleged "misstatements." The Court of Appeals apparently did not believe that such a finding was necessary. For all that appears, the ad was effective because the public agreed with Western that TGCs were not all that attractive in view of the regulatory drawbacks.

The district court also found — on evidence so flimsy that it does not even meet the substantial evidence test — that Western leveraged its power in the market for Minneapolis-Las Vegas tickets to discourage one Minnesota travel agent (MSAA) from doing TGC business. App. 11d-12d. As shown below, this finding does not provide an independent basis to sustain the result below. The Eighth Circuit's affirmance of this holding, however, involved a clear denial of appellate review because there was no evidence to support the district court's finding.

Proceedings Below

On May 21, 1974, ITA filed its complaint pursuant to §§ 1 and 2 of the Sherman Act, 15 U.S.C.§§ 1 & 2, and § 4 of the Clayton Act, 15 U.S.C. § 15. The case was originally tried

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6. "GET YOUR TRAVEL AGENT'S ADVICE"

"As a professional, your travel agent can best advise you about your vacation plans. He understands all the pros and cons of Travel Group Charters."

The special master found that this statement was also "misleading" since at the time of the ad "travel agents did not know much about the TGC concept" and because Western had sent letters to local travel agents attacking TGCs. App. 7d. The Eighth Circuit held that it was irrelevant whether travel agents knew the pros and cons of TGCs; what was important to that court was the fact that Western was directing consumers to travel agents while trying to persuade such agents to book their customers on Western. 623 F.2d at 1264; App. 14a-15a. The privilege of a firm to promote consumer confidence in the expertise of its distributors, however, is well-established. ITA itself encouraged travelers to see their travel agents regarding TGCs. 11 Tr. 149-150. The public could hardly have been "misled" by the ad. It was *clear* that Western was encouraging use of Western's services instead of TGCs, and any sensible reader would have known that Western would be recommending inquiry with travel agents because Western expected the answers to be favorable to Western.

to a jury before a magistrate and a verdict was returned in ITA's favor on August 4, 1977. On February 22, 1978, the district court ordered a new trial on the ground that the magistrate could not lawfully preside over the jury trial. The parties waived jury, and the district court appointed the magistrate to be special master for trial of the issues, pursuant to 28 U.S.C. § 636(b)(2). The case was submitted to the special master on the prior record, augmented with additional evidence.

On June 7, 1978, the special master filed his findings of fact, conclusions of law and recommended order for judgment. The special master concluded that Western and its advertising agency had combined and conspired in restraint of trade "by knowingly and actively participating in a course of anticompetitive conduct." App. 19d. He also concluded that Western had attempted to monopolize and had monopolized individually ticketed air transportation on the Twin Cities/Hawaii route in violation of § 2 of the Sherman Act. App. 20d. Accordingly, the special master recommended that judgment of $361,596 be entered against Western, together with interest and attorneys' fees. App. 21d. On October 17, 1978, the district court adopted the special master's findings of fact, with the exception of one finding that is irrelevant to this petition, and accepted the special master's recommendation for judgment. App. 1c-2c.

The Court of Appeals affirmed in most respects.[4] It held that Western's anti-TGC campaign consisting of the newspaper ad, the radio commercial encouraging listeners to read the ad and the pre-advertisement letters to travel agents amounted to an unreasonable restraint of trade. 623 F.2d at 1266-68; App 19a-24a. According to the court, the participation of Western's advertising agency in formulating the advertising campaign satisfied the "contract, combination or conspiracy" requirement of § 1 of the Sher-

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4. Although the Court of Appeals affirmed the district court's judgment as to liability and damages, it reduced the district court's award of attorneys' fees against Western by $25,000 and limited the contingency fee that respondent would otherwise have owed its counsel. 623 F.2d at 1273-78; App. 33a-43a.

man Act, even though the agency "acted only as an agent providing technical services to Western." *Id.* at 1265-66; App. 16a-19a. Having fabricated a conspiracy, the court went on to hold that, although the advertising campaign was "not a conventional 'restraint of trade' " and was, "in fact, a form of competition," such competition was unreasonable because it was "not fair competition," because it was done with "the purpose of preventing any effective competition from ITA's TGCs," and because of the "tremendous effect of Western's campaign." *Id.* at 1267-68; App. 21a-24a.

The court paid no attention to Western's argument that any error in the advertisement had not been intentional, and that antitrust liability cannot be based on unintended inaccuracies. The only treatment of this point was the court's morbid concern with the fact that Western intended the ad to prevent TGCs from becoming a competitive threat. *Id.* at 1268; App. 23a. Likewise, the Court of Appeals gave no consideration to the serious issue of antitrust causation raised by its own faulty analysis. It wholly ignored the likely prospect that the general impact found by the district court was the natural result of the fact that Western's ad disclosed actual problems with TGC arrangements of which the public had been unaware prior to that ad.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case because of the unprecedented declaration of a virtual *per se* rule against competition by advertising. A firm that is considering advertising must hereafter fear the likelihood that a competitor will bring and win a treble damage action if it publishes an effective advertisement. All that is needed to support such a claim under the decision below is ordinary competitive intent and some minor inaccuracy.

What the Court of Appeals did is dramatically evident in the advice a lawyer must now give a client thinking of publishing an ad:

1. Never use an advertising agency — that could be found to involve you in a conspiracy under the antitrust laws;

2. Avoid advertising facts about your competitor's product — some judge or jury may find that your statements leave an ambiguity that you were required to dispel;

3. Avoid directing your advertisements at consumers — that might be held an unlawful "frontal attack";

4. Do not follow up on your ads with distributors — that could make the ad unlawful as part of a "course of conduct";

5. Do not advertise if anyone in your employ has written in internal correspondence about the importance of responding to competition — that could show an undue intent to prevail; and

6. Safest of all, don't do comparative advertising.

In its effect on competition, the decision below is a repudiation of the Sherman Act and its purpose. It ought to be expunged.

The Sherman Act was designed to be a comprehensive charter of "free and unfettered competition." *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 4 (1958). "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources." *Id.* It is not concerned with individual competitors, nor does it immunize a new competitor or a new form of competition from vigorous scrutiny in the marketplace. The Sherman Act invariably counsels every firm to compete vigorously, all the time.

Advertising, especially when it seeks to communicate relevant facts to the public, is a healthy and constructive means of competition. It "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona,* 433 U.S. 350, 364 (1977). It is the very nature of advertising, moreover, to advocate the sponsor's interest vividly. In the Sherman Act theory of unfettered competition, the market is left to judge whether an ad is overstated or in bad taste.

This is not to say that the content of advertisements is beyond inquiry. State law rules against unfair competition provide enforceable restrictions on an advertiser's latitude. The fact that a practice requires regulation does not, however, make that practice a proper topic for Sherman Act concern. Quite the opposite in this case — the basic purpose of laws against unfair competition is to impose restrictions on the range of competitive endeavor. The basic purpose of the Sherman Act is to prevent restrictions on competition. These purposes are divergent. *Northwest Power Prods., Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 88 (5th Cir. 1978).[5] The practical consequence of this divergence is to allocate to the state courts a responsibility which the federal courts are not funded or staffed to administer.

Certiorari is also warranted in this case because the Eighth Circuit's decision virtually nullifies the requirement under § 1 of a "contract, combination or conspiracy." The Sherman Act is concerned with economically-relevant "combinations." It is not preoccupied with simplistic literalism. *Broadcast Music Inc. v. CBS*, 441 U.S. 1, 9 (1979). Yet, it is charitable to call the decision below simplistic in its treatment of advertising agency services. A "trust" does not exist merely because a firm contracts to have services rendered for a fee by a specialized agency. To sustain such a decision is fundamentally restrictive of those service organizations that promote efficiency and effective competition by supplying industrial firms with specialized services they are not well advised to provide internally. The use of independent agencies does not change the economic effect of the sponsor's advertising conduct, and therefore the use of such agencies is irrelevant to § 1 considerations.

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5. Case histories are not included in the text of this petition unless germane to the discussion. Full case histories appear in the table of authorities.

I. THE COURT OF APPEALS' OPINION THREATENS THE PRIMARY GOAL OF THE SHERMAN ACT BECAUSE IT CONDEMNS LEGITIMATE COMPETITION SOLELY BECAUSE IT WAS AGGRESSIVE.

Despite appearances, the Court of Appeals did not hold that Western had violated the Sherman Act because its TGC advertisement was inaccurate. The label of "false advertising" is a red herring in this case.

Western was condemned because it meant to compete with TGCs too effectively for the sensibilities of the Eighth Circuit panel. According to the Court of Appeals, the "crux" of its holding was "the purpose of the anti-TGC campaign." The Eighth Circuit thought that unreasonableness was "clear" because Western's ad had "tremendous effect." 623 F.2d at 1268; App 24a. In short, Western's actions violated the Sherman Act because they supposedly went "to the jugular" rather than "one of the lesser arteries." *Id.* But competition on the merits does not exclude going for the jugular, especially where the "jugular" consists of nothing more than the inability to withstand public scrutiny of the facts. "It is the very nature of competition that the vigorous efficient firm will drive out less efficient firms." *Janich Bros. Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977).

The Court of Appeals' preoccupation with limiting the vigor of advertising competition is plain from the fact that the court found it "unfruitful, and additionally unnecessary, to examine individually the seven allegedly false, deceptive or misleading statements." 623 F.2d at 1263; App. 14a. The issues of concern to the court were "first, whether the ad as a whole, contributed to the 'anti-TGC campaign,' and second, whether the campaign constituted an unreasonable restraint of trade under Section 1 of the Sherman Act." *Id.*

The seven statements criticized by the special master were deemed relevant by the Eighth Circuit only to the extent that they reflected "the personality of the ad as a whole." *Id.* at 1264; App. 14a. Thus, for example, the

Eighth Circuit was not concerned with the literal truth of the statement that the travel agent "understands all the pros and cons of Travel Group Charters"; "[w]hat is most important" is that Western was attempting to win business for itself and away from the TGCs through the standard marketing practice of encouraging the public to deal with distributors Western expected to be supportive of its services. *Id.*; App. 14a-15a. It was this practice, not falsity, that concerned the Eighth Circuit.

The purpose of the Sherman Act is "to promote the most vigorous competition possible." *Southland Reship, Inc. v. Flegel,* 401 F. Supp. 339, 347 (N.D. Ga. 1975). Indeed, the Eighth Circuit seems to have recognized, if only momentarily, that advertising is a means of competition not to be condemned under the antitrust laws. 623 F.2d at 1267; App. 22a. But the Court of Appeals then went on to conclude that competition is a violation of the antitrust laws where the purpose is to win out too successfully in the marketplace. Apparently there can be a Bull Run in the competitive fray, but woe to the firm that sets out to win a Gettysburg. This fastidious distinction has no basis in the Sherman Act, and conflicts with numerous rulings of this Court and the other federal courts.

It is virtually impossible to distinguish the intention to compete from the intention "to prevent TGCs from becoming a competitive threat." The intention to prevail is inevitably "exclusionary" — it is the nature of competition to strive for all of the available business. *See, General Communications Engineering, Inc. v. Motorola Communications & Electronics, Inc.,* 421 F. Supp. 274, 286 (N.D. Cal. 1976); *Mar Food Corp. v. Doane,* 405 F. Supp. 730, 731 (N.D. Ill. 1975). In a competitive world, a seller cannot be certain how successful his efforts will be, and cannot afford the luxury of conceding business to his rivals. Thus, as the Ninth Circuit said in a recent case, "the very essence of a competitive marketplace . . . is to prevail against all competitors." *Blair Foods, Inc. v. Ranchers Cotton Oil,* 610 F.2d 665, 670 (9th Cir. 1980).

Furthermore, motive has no relevance under the Sherman Act unless it results in actions that are unreasonable restraints of trade. "[T]he Sherman Act permits a

person to have an intent to exclude another from the market if this intent is accomplished without resort to predatory or unfair practices." *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 144 (D. Mass. 1959). *See, Dahl Inc., v. Roy Cooper Co.*, 448 F.2d 17, 19 (9th Cir. 1971). The reason that motive has only this qualified relevance is obvious: "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977). Motive, except as it results in actions, is divorced from market considerations; and conversely, healthy competitive acts have exactly the same market significance regardless of the private intent of the actor.

Whatever Western's subjective intent may have been, the only manifestation of that intent in the marketplace was the use of a vigorous advertising campaign. There is no room for dispute that such campaigns are a part of the free play of competitive forces and are protected and not to be curtailed under Sherman Act policy. *Cf. Bates v. State Bar of Arizona, supra; United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961) (holding an agreement *not* to advertise to be a violation of the Sherman Act).

Accordingly, the Eighth Circuit's decision is at war with the purpose of the Sherman Act when it substitutes criticism of Western's intent for analysis of the objective character of Western's conduct.

II. AS COURTS IN NUMEROUS OTHER CIRCUITS HAVE RECOGNIZED, THE SHERMAN ACT IS NOT SUITED TO REGULATE GARDEN VARIETY FALSE ADVERTISING CLAIMS.

The Court of Appeals did use the words "false, misleading and deceptive" advertising in characterizing Western's TGC campaign as an unreasonable restraint of trade. 623 F.2d at 1268; App. 23a. As shown, however, the court plainly used the words false, misleading and deceptive in an unconventional way because it found falsity and deception pursuant to an approach that considered examination of the truth of the statements "unfruitful" and "unnecessary." Even if the court's decision were somehow taken

to imply a ruling based on falsity of the content of the Western ad, however, imposing treble damage liability for an unintended inaccuracy in a single ad is itself obnoxious to the purpose of the Sherman Act.

Until this decision, no case has imposed a Sherman Act duty to guarantee the accuracy of advertising copy. And for good reason. Such a doctrine would chill competitive advertising and commit the federal courts to the court-congesting task of creating a federal common law of commercial disparagement contrary to the will of Congress.[6]

This case, moreover, is an especially inappropriate vehicle for introduction of such a novel doctrine. Although one statement in Western's TGC ad was inaccurate, the other six statements criticized by the district court were clearly accurate, even if open to response or clarification. Moreover, the one inaccuracy was unintentional, and was so treated in the Eighth Circuit's opinion. Equally bizarre, no finding of commercial or antitrust materiality was made as to those portions of the Western ad held to be inaccurate or misleading. If Sherman Act liability exists for the defects of Western's ad in this case, few, if any, advertisements are not Sherman Act violations.

A. Routine False Advertising Claims Are Not Actionable Under The Sherman Act.

Prior courts have recognized that regulation of advertising copy is a treacherous undertaking under the Sherman Act. The purpose of the Act is to foster competition, and advertising is one means of competing. This is especially true of competitive advertising that helps consumers to obtain information "relevant and useful in making an informed choice between competing products." FTC News Release 1-03-20 (March 30, 1972). The sanction of treble

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6. The awesome penalty of treble damages also threatens overdeterrence of constructive and constitutionally protected commercial speech. *Eastern R. Conf. v. Noerr Motors,* 365 U.S. 127 (1961). *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* ..... U.S. ....., 100 S. Ct. 2343 (1980); *Bates v. State Bar, supra; Virginia Pharmacy Bd. vs. Virginia Consumer Council,* 425 U.S. 748 (1976).

damages available under the antitrust laws is brutally severe, and is intended to create a strong deterrent to conduct which might give rise to such damages. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). Because of that nuclear deterrence, courts "must always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979). Since the line between illegitimate and customary salesmanship is inevitably a hazy one, Sherman Act regulation of advertising practices runs a disproportionate "risk of overbreadth, encompassing conduct which fosters competition; of weakening, through making available sanctions which may in practice be avoided, the deterrent effect of the antitrust laws; of subjecting defendants to captious resort to treble damage suits, with evaluation of subjective intent being the chief determinant, and varying from jury to jury." *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 560 (1st Cir. 1974).

Thus, courts have generally agreed that false advertising claims are not the stuff of antitrust, even where *intentional* disparagement of a competitor is present. Several courts have ruled that fraudulent misrepresentations, without more, *cannot* present a claim under § 1 of the Sherman Act. *See, e.g., Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1355-56 (2d Cir. 1976); *Oak Distributing Co. v. Miller Brewing Co.*, 370 F. Supp, 889, 898 (E.D. Mich 1973); *Black & Yates, Inc. v. Mahogany Ass'n*, 34 F. Supp. 450, 456 (D. Del. 1940), *rev'd on other grounds*, 129 F.2d 227 (3d Cir. 1941). Other courts have been willing to assume that intentionally fraudulent and unfair competitive tactics *might* constitute violations of the Sherman Act, but only if extraordinary circumstances were present. *See, e.g., Berkey Photo Inc., supra*, 603 F.2d at 287-88; *Northwest Power Products, supra*, 576 F.2d at 86-90; *George R. Whitten, supra*, 508 F.2d at 555-560. In every case, moreover, courts have recognized that the standards of "salesmanship" prevailing in the marketplace establish a baseline which must be exceeded before it is appropriate even to consider possible antitrust liability. *General Communications Engineering, supra*, 421 F. Supp. at 289-90.

The decision here is at odds with all of the foregoing precedent. Not only did the Eighth Circuit turn a single ad containing a single unintended error into a "restraint of trade," but it ignored the fact that Western's sales puffery was consistent with the ethic of the market involved.[7] In this light, Western's ad was, at worst, no more than "seller's talk," a form of exaggeration that is, itself, a part of competition. Thus, as to nature, extent and circumstances, the *per se* rule fixed below is at odds with existing Sherman Act authority.

Even if the Court of Appeals believed that Western should be held liable for any damages arising from unintentional inaccuracies in its ads, it was mistaken in using the Sherman Act for this purpose. As this Court has often warned, the Sherman Act "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945). *See also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512 (1940). The Act was intended for "the protection of *competition*, not *competitors*." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). It was never meant to address " 'garden variety' competitive business torts." *George R. Whitten, supra*, 508 F.2d at 560. *See, Laurie Visual Etudes, Inc. v. Chesebrough-Pond's, Inc.*, 473 F. Supp. 951, 959-60 (S.D.N.Y. 1979).

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7. The Western ad certainly went no further in overstating the problems with TGCs than the ITA ads went in disguising those problems. *See* p. 6, *supra*. The practice of the marketplace is an indispensable antitrust consideration because the antitrust laws are not designed to impose a standard of scrupulous accuracy, but rather to interdict conduct that goes so far beyond market custom so as to become a restraint on the *opportunity* to compete. See 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 738d, at pp. 280-81 (1978). The contention that an arguable overstatement in an ad goes beyond mere tit-for-tat competition has no substance where overstatement is common to all advertising in the relevant market. This was the relevance of Western's proof concerning the inaccuracy of ITA's ads. The Court of appeals distorted the antitrust laws by failing to recognize this distinction. *Compare Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 586-87 (1st Cir. 1960) *with* 623 F.2d at 1262 n. 10; App. 11a-12a n. 10.

Injury that may be suffered as a result of advertising inaccuracies can be remedied by state common law of commercial disparagement. Awarding treble damages intrudes into an area that Congress has chosen to leave to the states.[8] "The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress." *Hunt v. Crumboch, supra,* 325 U.S. at 826, quoting *Apex Hosiery Co., supra,* 310 U.S. at 513. This principal is especially applicable here because "the purposes of the antitrust law and unfair competition law generally conflict. The thrust of antitrust law is to prevent restraints on competition. Unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition." *Northwest Power Products, supra,* 576 F.2d at 88.

B. The Eighth Circuit's Decision Is In Square Conflict With The Second Circuit's Decision In Berkey Photo, Inc. v. Eastman Kodak Co.

The issue of when inaccuracies in advertising might constitute a violation of the Sherman Act was thoughtfully decided by the Second Circuit in *Berkey Photo Inc. v. Eastman Kodak Co., supra.* In *Berkey,* the defendant's monopoly power was undoubted, and the scope of its advertising campaign far greater than the single ad at issue here. The plaintiff argued that Kodak violated §2 of the Sherman Act because it misrepresented its products to the market. Although the applicable antitrust standard had to be at least as stringent as any standard applicable to Western, the *Berkey* court rejected the claim that mere inaccuracy could justify a treble damage award under the Sherman Act. "[I]n its advertising, a producer is ordinarly

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8. Although the Federal Trade Commission has the power to correct "unfair or deceptive acts or practices," 15 U.S.C. § 45(a)(1), Congress has resisted attempts to provide for a parallel private action for damages. Callman, *Unfair Competition, Trademarks & Monopolies,* § 43 at pp. 137-42 (3d ed 1967).

permitted, much like an advocate at law, to bathe his cause in the best light possible." 603 F.2d at 287. Thus, Kodak had not violated the antitrust law because, being aware that its 110 camera had substantial "red-eye" problems, it decided to avoid disclosure of this weakness by assuring that there was "enough ambient light for exposure without flash" at its press conference announcing the camera. *Id.* at 287-88 n.40. Although this tactic was at least as "misleading" as Western's ad in this case, it was not *restrictive* of competition. "Advertising that emphasizes a product's strengths and minimizes its weaknesses does not, at least unless it amounts to deception, constitute anticompetitive conduct violative of § 2." *Id.* at 287-88.

The Second Circuit went on to hold that even an outright misrepresentation did not trigger Sherman Act liability:

> "There was evidence that Kodak indicated on the boxes in which Kodacolor II was sold that the film had a shelf life of 14 months, whereas in fact the film lost half its speed within three to six months. We need not decide whether this action amounted to deceptive advertising, or whether and under what circumstances such deception might amount to a violation of § 2. *See* 3 P. Areeda & D. Turner, *supra,* at 278-79. The Sherman Act is not a panacea for all evils that may infect business life. Before we would allow misrepresentation to buyers to be the basis of a competitor's treble damage action under § 2, we would at least require the plaintiff to overcome a presumption that the effect on competition of such a practice was *de minimis* . . ." *Id.* at 288 n.41.

The Eighth Circuit's decision in this case is in total conflict with the decision in *Berkey.* Consistent with generations of Sherman Act precedent, the Second Circuit refused to protect an unhappy competitor from the natural consequences of effective advertising. Although Kodak's labelling was literally untrue in at least one respect, the Second Circuit recognized a strong presumption against antitrust

relevance of such misstatements.[9] If the inaccuracy had relevance, it had to be under state law principles. In contrast, the Eighth Circuit strained to find "misrepresentations" in the Western ad, "misrepresentations" consisting almost entirely in the fact that the ad sought to bathe Western "in the best light possible." The court ignored materiality; it ignored inadvertence; its guiding consideration was the fact that Western sought to compete too earnestly. As the Fifth Circuit said in *Northwest Power Products, supra,* such a holding itself restrains competition.

C. The Court of Appeals' Failure To Consider The Materiality Of The Alleged Inaccuracies Subverts This Court's Decision In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

This Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* forestalled an emerging misuse of the treble damage remedy. In *Brunswick,* the Court emphasized that treble damages are recoverable only for antitrust injury (*i.e.*, injury caused by a suppression of competition) and not for competitive injury (*i.e.*, business lost as a natural result of the competitive process). 429 U.S. at 486-89. The antitrust laws never entitle a firm to be immune from the public-serving rigors of the competitive process. *Id.* The decision of the court below repudiates *Brunswick,* and awards ITA three times the profits that it could have realized if there had been no competition whatsoever from Western or any other source.

There is not the slightest suggestion in the Eighth Circuit's decision that the alleged "misrepresentations" in Western's ad produced injury to ITA. The court found that the ad, *as a whole,* was material to the fall-off in traveler interest in TGCs, but there was *no* evidence that the mistaken statement — that all prior TGCs from the Twin Cities to Hawaii had to be cancelled — had a material

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9. The Second Circuit clearly did not hold that Kodak's campaign on the whole had *de minimis* effect. 603 F.2d at 287.

effect. There hardly could have been. Advertisements for Hawaii TGCs appeared adjacent to Western's ad; no reader could have been seriously confused about the existence of active TGC filings. Nor was there any evidence that any of the other six statements criticized by the district court had a material effect on TGC patronage. Thus, although the Eighth Circuit found that Western's ad was highly effective competition, there was no evidence that the alleged falsity of the ad was the source of any loss of trade whatsoever.[10] This treatment is not surprising in view of the lower court's belief that the ad was actionable not because of inaccuracies, but because it was a "frontal assault" on TGCs. The anti-competitive implications of such a holding, however, represent a "frontal assault" on *Brunswick*.

III. THE EIGHTH CIRCUIT'S HOLDING THAT THE USE OF AN ADVERTISING AGENCY IS A "CONTRACT, COMBINATION OR CONSPIRACY" UNDER § 1 WILL PRODUCE ABSURD RESULTS AND CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

Section 1 of the Sherman Act applies only to "contracts, combinations or conspiracies." Unilateral conduct is not its concern. The Court of Appeals found the "conspiracy" requisite to invocation of § 1 in the simple participation of an advertising agency in the preparation of Western's TGC advertising campaign. Citing this Court's opinion in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), the Eighth Circuit held that there was the requisite economic "combination" of actors because the ad agency "materially aided" in the campaign, and knew that its purpose was to enable Western to prevail in competition against TGC operators. 623 F.2d at 1266; App. 18a-19a. This holding, far

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10. As noted by the Court of Appeals, Western's publication of a similar ad on the West coast was as effective as the Twin Cities ad. 623 F.2d at 1260; App. 8a. Yet the West coast ad had not contained the one factual error in the Twin Cities ad nor most of the other statements criticized by the special master. Ex. 53.

from being controlled by *Albrecht,* turns *Albrecht* into an embarrassment and conflicts with the decisions of numerous circuit and district courts.

The requirement of a "conspiracy" under § 1 is not a meaningless appendage. Congress did not intend to restrict actions of a single firm, whether carried out internally or through outside agents, but to proscribe those conspiracies between firms "where the element of collaboration *itself* presents a special threat to competition." *State of Arizona v. Cook Paint & Varnish Co.,* 391 F. Supp. 962, 969 (D. Ariz. 1975), *aff'd,* 541 F.2d 226 (9th Cir. 1976).[11] *See, Fuchs Sugars & Syrups, Inc. v. Amstar Corp.,* 602 F.2d 1025, 1030 (2d Cir. 1979). The fact that a firm uses outside agents is irrelevant for Sherman Act purposes except where the collaboration itself has anticompetitive effects. *Harold Friedman, Inc. v. Kroger Co.,* 581 F.2d 1068, 1072-79 (3d Cir. 1978).

The Eighth Circuit's decision ignores the relevance of the "conspiracy" requirement and extends § 1 to virtually every activity where a firm uses services of an outside agency to perform tasks that it might do internally. Nothing in the relationship between an advertiser and an advertising agency justifies assessing antitrust damages for use of an advertising agency. The economic consequences of using an agency or using "in-house" advertising technicians are identical.

The rule created by the court below, moreover, is an artificial restraint of trade because it creates a deterrent to use of advertising agencies. Since the option to use advertising agencies enhances the range of competition, there is no doubt that the Eighth Circuit's restriction on the use of ad agencies is unreasonable. To a very large extent, effective use of advertising media depends on judicious use of advertising agencies. Advertising agencies clearly offer many firms a more efficient means of employing specialized talent and expertise to maximize the competitive success of their investments in advertising, and for some firms use of such agencies is likely to be essential to

11. Emphasis supplied in all quotations unless otherwise noted.

remaining competitive in the contest for the "hearts and minds" of consumers.[12]

This Court's decision in *Albrecht* does not support such an absurd result. In *Albrecht,* the Herald Company threatened to take over Albrecht's newspaper route unless Albrecht agreed to sell his papers at the Herald's suggested retail price. When Albrecht refused, the Herald hired Milne Circulation Sales to solicit subscriptions from Albrecht's customers at the suggested price and then entered into an agreement with George Kroner to deliver papers that Milne lured away. Several factors supported this Court's findings of a "conspiracy in restraint of trade," especially the fact that the agreement between the Herald and Kroner directly restrained trade in that the agreement itself set a fixed price. Further, Kroner's profit was directly related to enforcement of the restraint. *Harold Friedman, supra,* 581 F.2d at 1073.

According to the Third Circuit in *Harold Friedman,* Milne's solicitation of customers on behalf of the Herald would not by itself have met the "conspiracy" requirement. *Id.* at 1073-74. Milne, unlike Kroner, did not benefit directly from the restraint of trade. "Its only purpose was to earn its solicitation fee." *Id.* at 1073 n.7. Moreover, Milne by soliciting customers "was merely performing its normal business function, and although that function facilitated the restraint of trade, it did not restrain trade." *Id.* at 1073. Where the party allegedly acting in concert with the defendants does not have a direct interest in restraining trade and enters into agreements that do not themselves restrain trade but merely facilitate a restraint of trade, there is no § 1 conspiracy. *Id.* at 1078-79.

Here, Western's advertising agency, like Milne, did not itself restrain trade in any way. At most, the advertising agency "facilitated the restraint of trade" by "performing its normal business function." Moreover, the agency's

12. The adverse implications of the Eighth Circuit's decision are not limited to the use of advertising agents. Under the Court of Appeals' opinion, a firm must integrate with every management consultant, accountant, lawyer, commission broker and other outside agent that it uses to avoid the risk of § 1 liability.

"only purpose was to earn its [advertising] fee"; the ad agency did not stand to gain directly from any increase in the volume of Western's business. Under the Third Circuit's decision in *Harold Friedman,* therefore, no Albrecht "conspiracy" existed.

The Eighth Circuit's decision is also in conflict with the holdings of numerous other federal courts. Although federal courts have been neither clear nor perfectly consistent in their interpretation of *Albrecht,* they have repeatedly recognized that a corporation cannot "conspire" with its agent for § 1 purposes if the agent merely performs a commercial function and the element of collaboration *itself* has no anticompetitive effects. *See, e.g., Golden v. Kentile Floors, Inc.,* 475 F.2d 288, 290 (5th Cir. 1973); *Austin v. House of Vision, Inc.,* 404 F.2d 401, 403 (7th Cir. 1968); *Realco Services, Inc. v. Holt,* 479 F. Supp. 880, 885 (E.D. Pa. 1979); *National Tire Wholesale, Inc. v. Washington Post Co.,* 441 F. Supp. 81, 87 (D.D.C. 1977), *aff'd,* 595 F.2d 888 (D.C. Cir. 1979); *Diehl & Sons, Inc. v. International Harvester Co.,* 426 F. Supp. 110, 117 (E.D.N.Y. 1976). *See generally* Harrington, *The Bathtub Overflows: Conspiracy with Advertising Agents, Management Consultants, Commission Brokers and Other 'Outside' Agencies Under Section 1 of the Sherman Act,* 22 Antitrust Bull. 741 (1977).

IV. THE MARKET LEVERAGE ISSUE DOES NOT SUPPORT THE JUDGMENT AND SHOULD NOT BE LEFT STANDING.

The Court of Appeals held, *inter alia,* that Western had used leverage that it had in the Minneapolis-Las Vegas market to discourage a single Minneapolis travel agent (MSAA) from promoting TGCs to other cities. If the judgment could be supported by this holding alone, *certiorari* might not be appropriate. In fact, however, the judgment below cannot possibly be sustained on the market leverage holding alone. This is clear from the section of the Eighth Circuit's opinion upholding the damage award. Again and again, the court repeats that the impact of the Western ad was the core of the damage finding. *E.g.,* 623 F.2d at 1270 & 1272-73; App. 27a & 30a-33a. Nowhere is there a

holding that the supposed leverage, by itself, would have produced the full damage award granted by the district court. On the contrary, the Eighth Circuit held that the ad and its effect were "enveloped within the section 2 claim" and that "the overall effect [of the ad] on TGCs was one of the reasons that led MSAA to cancel its participation in the ITA TGC program." 623 F.2d at 1272 & 1273; App. 30a & 33a.

The Eighth Circuit's decision on market leverage, moreover, was an abandonment of an appellate court's obligation to protect a defendant's right to a fair trial. According to the special master's findings, "statements and conduct" of a Western representative at a September 25, 1973 meeting that MSAA had demanded "forced MSAA to recognize" that Western could reduce a favorable allocation of cut-rate tickets for Las Vegas that MSAA had been receiving. App. 11d-12d. Had the Court of Appeals examined the uncontradicted record, however, it would have found that there were no "statements or conduct" at the September 25 meeting that could subject Western to liability for use of market leverage. MSAA representatives, not Western, raised Las Vegas as a topic at the meeting; MSAA reminded Western that Western stood to lose MSAA as a fertile source of Las Vegas traffic if Western were to aggravate MSAA. 11 Tr. 77-78, 83, 185. There was *no* evidence to support the claim that Western threatened, either openly or through a "veil," to use its potential Las Vegas tickets to discourage participation in TGCs, and the Eighth Circuit acknowledged as much. 623 F.2d at 1269-70; App. 26a.

Although there was a total failure of proof, the Eighth Circuit affirmed the special master's findings, noting vacuously that it was not its "function to try this case *de novo*." 623 F.2d at 1270; App. 27a. In so doing, the Eighth Circuit shirked its responsibility, reemphasized only last year by this Court, to review and set aside findings that are clearly erroneous. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 n.8 (1979). The Eighth Circuit had "not only the power to set aside findings of fact that are clearly erroneous, . . . but the duty to do so. The finder of fact is entitled to respect but not to a patent of infallibility." *United*

States v. Cruz, 581 F.2d 535, 541 (5th Cir. 1978) (*en banc*). If the Court takes this case and reverses, the market leverage issue should be remanded for serious consideration on the merits in order to cure this miscarriage of justice.

V. CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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